

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANGELA CUMMINGS,

Plaintiff(s),

v.

VALLEY HEALTH SYSTEM, LLC, et al.,

Defendant(s).

Case No. 2:16-CV-2486 JCM (GWF)

ORDER

Presently before the court is defendant Valley Health System, LLC's ("Valley") motion to dismiss. (ECF No. 16). Plaintiff Angela Cummings filed a response (ECF No. 19), to which Valley replied (ECF No. 20).

I. Facts

The instant action involves allegations of retaliatory interference with prospective employment pursuant to 42 U.S.C. §§ 1981 and 2000e-3 *eq seq.* and NRS 613.200(1) and NRS 613.210, arising from a rescission of a job offer by the Veterans Administration ("VA") allegedly based on circumstances surrounding plaintiff's employment history. (ECF No. 13).

Plaintiff, an African American female, was employed as a monitor tech/unit coordinator by Valley at its Desert Springs Hospital operation from March 2005 to February 2013. (ECF No. 13). In 2012, plaintiff filed charges of discrimination with the Nevada Equal Rights Commission ("NERC") and Equal Employment Opportunity Commission ("EEOC") against Valley based on sex and race discrimination. (ECF No. 13). In January 2013, Valley suspended plaintiff, and plaintiff filed a subsequent charge of discrimination and retaliation, which she amended after her termination. (ECF No. 13).

1 Plaintiff brought suit based on the 2012 and 2013 charges in case number 2:13-cv-00479-
2 APG-GWF, which she lost. (ECF No. 13). The matter is currently pending before the Ninth
3 Circuit on appeal in case number 16-15369. (ECF No. 13).

4 In March 2015, plaintiff applied for a position as a medical instrument technician with the
5 VA's Southern Nevada Healthcare System ("SNHS"). (ECF No. 13). Maria Roldan interviewed
6 plaintiff, inquiring about her relevant work history and the reasons for her leaving her job at Desert
7 Springs Hospital. (ECF No. 13). Plaintiff disclosed her termination from Desert Springs Hospital
8 to Roldan. (ECF No. 13).

9 On June 17, 2015, plaintiff received a tentative offer of employment from the SNHS,
10 pending fingerprinting, a background and reference check, drug screening, various forms, and
11 physical and boarding process. (ECF No. 13). Throughout this process, plaintiff maintained
12 contact with two VA human resources ("HR") representatives, Nadine Harris and Merlinda
13 Winbush. (ECF No. 13).

14 In September 2015, Harris advised plaintiff that the HR department had initiated the final
15 step of the application process, which was employment verifications to former employers,
16 including Valley. (ECF No. 13). Harris further informed plaintiff that the verification packet
17 would be sent to Desiree Crawford, VA Associate Nurse Executive, for review and signature and
18 then to the Professional Standards Board ("PSB"). (ECF No. 13). Plaintiff was scheduled to meet
19 with the PSB on October 8, 2015. (ECF No. 13). However, the packet was not forwarded to the
20 PSB because Crawford had not signed it due to being out of the office on business. (ECF No. 13).

21 On November 10, 2015, Winbush called plaintiff and stated that the VA was rescinding its
22 job offer. (ECF No. 13). On that same date, an email was sent to plaintiff informing her that the
23 VA decided to rescind her tentative job offer due to plaintiff's employment history. (ECF No. 13).
24 Plaintiff made various attempts to contact the VA to inquire about the rescinding of its job offer.
25 (ECF No. 13). Plaintiff alleges that she received a letter from Crawford dated December 8, 2015,
26 which stated that the reason for the withdrawal was because of plaintiff's "terminat[ion] from
27 employment with Valley Health Systems for '. . . violation of company policy and work
28 performance issues" (ECF No. 13 at 8).

1 Plaintiff alleges that Valley provided negative and misleading information to the VA for
 2 the purpose of interfering with plaintiff's employment opportunity with the VA. (ECF No. 13).
 3 On May 27, 2016, plaintiff filed a charge of retaliation with the EEOC. (ECF No. 13). The EEOC
 4 issue a notice of suit rights on June 24, 2016. (ECF No. 13).

5 Plaintiff filed the original complaint in state court on September 21, 2016. (ECF No. 1-3).
 6 Valley removed the action to federal court on October 25, 2016. (ECF No. 1). Plaintiff later
 7 amended her complaint on November 18, 2016. (ECF No. 13). In the amended complaint, plaintiff
 8 alleges three causes of action: (1) retaliation in violation of 42 U.S.C. § 1981; (2) intentional
 9 interference with prospective economic advantage; and (3) retaliation in violation of 42 U.S.C. §
 10 200e-3. (ECF No. 13).

11 In the instant motion, Valley moves to dismiss plaintiff's amended complaint pursuant to
 12 Federal Rule of Civil Procedure 12(b)(6). (ECF No. 16). In addition, Valley moves for sanctions
 13 pursuant to Rule 11 (ECF No. 22), and plaintiff moves for sanctions pursuant to 28 U.S.C. § 1927
 14 (ECF No. 34). The court will address each in turn.

15 **II. Legal Standard**

16 A court may dismiss a complaint for "failure to state a claim upon which relief can be
 17 granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain
 18 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell*
 19 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
 20 factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the
 21 elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

22 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550
 23 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
 24 matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation
 25 omitted).

26 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
 27 when considering motions to dismiss. First, the court must accept as true all well-pled factual
 28 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.

1 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory
 2 statements, do not suffice. *Id.* at 678.

3 Second, the court must consider whether the factual allegations in the complaint allege a
 4 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
 5 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the
 6 alleged misconduct. *Id.* at 678.

7 Where the complaint does not permit the court to infer more than the mere possibility of
 8 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.*
 9 (internal quotation marks omitted). When the allegations in a complaint have not crossed the line
 10 from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

11 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
 12 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

13 First, to be entitled to the presumption of truth, allegations in a complaint or
 14 counterclaim may not simply recite the elements of a cause of action, but must
 15 contain sufficient allegations of underlying facts to give fair notice and to enable
 16 the opposing party to defend itself effectively. Second, the factual allegations that
 are taken as true must plausibly suggest an entitlement to relief, such that it is not
 unfair to require the opposing party to be subjected to the expense of discovery and
 continued litigation.

17 *Id.*

18 **III. Discussion**

19 **A. Motion to Dismiss**

20 ***1. Retaliation (claims 1 & 3)***

21 While plaintiff makes separate claims for discrimination in violation of Title VII (claim 3)
 22 and the Civil Rights Act of 1866 (claim 1), the Ninth Circuit has held that the same evidentiary
 23 standards and analytical framework apply to both statutes. *See Metoyer v. Chassman*, 504 F.3d
 24 919, 930-31 (9th Cir. 2007). Therefore, the court will analyze these claims together.

25 In the instant motion, Valley argues that plaintiff’s speculative allegations that Valley
 26 provided negative information about plaintiff to the VA cannot be accepted as true. (ECF No. 16
 27 at 5). Valley further contends that plaintiff fails to sufficiently allege a causal connection between
 28 her charges and a lawsuit against Valley and Valley’s alleged retaliatory conduct—*i.e.*, that the

1 reason Valley retaliated against plaintiff by allegedly providing misleading negative information
2 to the VA was because plaintiff filed charges and a lawsuit against Valley in 2012 and 2013. (ECF
3 No. 16 at 7–8). Valley maintains that plaintiff cannot rely on her filings approximately three years
4 prior to support an inference of causation. (ECF No. 16 at 8). The court agrees.

5 Federal law provides that “it is unlawful to retaliate against an employee because she has
6 taken action to enforce rights protected under Title VII.” *Miller v. Fairchild*, 797 F.2d 727, 730
7 (9th Cir. 1986). “To succeed in a retaliation claim, the plaintiff must demonstrate (1) that she was
8 engaging in protected activity, (2) that she suffered an adverse employment decision, and (3) that
9 there was a causal link between her activity and the employment decision.” *Hashimoto v. Dalton*,
10 118 F.3d 671, 679 (9th Cir. 1997).

11 In her amended complaint, plaintiff alleges that Valley retaliated against her “after she
12 complained and participated in charges of discrimination and retaliation including the litigation of
13 those charges and complaints.” (ECF No. 13 at 10). In particular, plaintiff alleges that she
14 “suffered one or more adverse consequences intentionally imposed by [Valley]” in retaliation for
15 her filing charges and a lawsuit against Valley for discrimination based on race and sex in 2012
16 and 2013. Plaintiff further alleges that Valley interfered with her employment opportunities with
17 the VA by providing negative and misleading information because the VA withdrew her tentative
18 job offer based thereon. (ECF No. 13 at 10–11).

19 Plaintiff, however, fails to allege sufficient facts to raise an inference of causation. She
20 filed charges and a lawsuit against Valley in 2012 and 2013, and Valley’s alleged retaliatory
21 conduct occurred in 2015. “A nearly 18-month lapse between protected activity and an adverse
22 employment action is simply too long, by itself, to give rise to an inference of causation.”
23 *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (citing cases).

24 In light of the foregoing, plaintiff has failed to state a retaliation claim against Valley
25 sufficient to withstand a 12(b)(6) motion to dismiss. Plaintiff fails to sufficiently allege that the
26 VA withdrawing her employment offer was based on the allegedly negative and misleading
27 information provided by Valley or that Valley providing such information to the VA was because
28 plaintiff filed charges and a lawsuit against Valley in 2012 and 2013. The complaint does not

1 contain facts sufficient to raise a reasonable inference that Valley is liable for the alleged
2 misconduct.

3 Accordingly, the court will grant Valley's motion to dismiss as to plaintiff's retaliation
4 claims (claims 1 & 3).

5 **2. *Intentional Interference with Prospective Economic Advantage (claim 2)***

6 In the instant motion, Valley argues that plaintiff fails to allege what Valley told the VA or
7 any factual basis for her information and belief. (ECF No. 16 at 9). Valley further contends that
8 plaintiff fails to allege any facts sufficient for the court to infer that Valley intended to harm
9 plaintiff or would have been unjustified in not recommending her for the position. (ECF No. 16
10 at 9). The court agrees.

11 To state a claim for wrongful or intentional interference with a prospective economic
12 advantage, a plaintiff must plead and prove five elements:

13 1) a prospective contractual relationship between the plaintiff and a third party; 2)
14 the defendant's knowledge of this prospective relationship; 3) the intent to harm
15 the plaintiff by preventing the relationship; 4) the absence of privilege or
justification by the defendant; and, 5) actual harm to the plaintiff as a result of the
defendant's conduct.

16 *Leavitt v. Leisure Sports Inc.*, 734 P.2d 1221, 1225 (Nev. 1987); *see also In re Amerco Derivative*
17 *Litig.*, 252 P.3d 681, 702 (Nev. 2011). "To establish this tort, a plaintiff 'must show that the means
18 used to divert the prospective advantage was unlawful, improper or was not fair and reasonable.'" *Williams v. Univ. Med. Ctr. of S. Nev.*, 688 F. Supp. 2d 1134, 1140 (D. Nev. 2010) (quoting *Custom*
19 *Teleconnect, Inc. v. Int'l Tele-Servs., Inc.*, 254 F. Supp. 2d 1173, 1181 (D. Nev. 2003)).
20

21 Here, plaintiff alleges that she possessed a prospective economic advantage as to her
22 employment opportunity with the VA. (ECF No. 13 at 11). In particular, plaintiff alleges that
23 Valley intentionally interfered with her employment opportunity with the VA because her tentative
24 employment offer was rescinded after Valley interfered by providing false and misleading
25 information about her termination to the VA. (ECF No. 13 at 8, 11–12). Plaintiff states that her
26 belief is based on her personal knowledge and experience with Valley and Valley's previous
27 treatment of her in the past. (ECF No. 13 at 9).
28

1 Plaintiff further alleges that the letter from Crawford stated the reason for the VA's
 2 withdrawing plaintiff's employment offer was because plaintiff had "been terminated from
 3 employment with Valley Health Systems for '. . . violation of company policy and work
 4 performance issues.'" (ECF No. 13 at 8). Plaintiff maintains that Valley provided the VA with
 5 negative and misleading information about her because the VA did not ask her about the details
 6 regarding her termination even though she had previously disclosed her termination from Desert
 7 Springs Hospital to the VA. (ECF No. 13 at 8).

8 However, plaintiff fails to provide sufficient facts as to the absence of justification by
 9 Valley. While plaintiff alleges that Valley provided false and misleading information, she fails to
 10 set sufficiently allege any false or misleading information provided by Valley. Plaintiff asserts
 11 that Valley provided negative information to the VA including her pending lawsuit, but fails to set
 12 forth any facts in support as to how providing information about her pending lawsuit was unlawful,
 13 improper, or unreasonable. In fact, plaintiff's amended complaint acknowledges that she was
 14 unsuccessful in her lawsuit against Valley and that an appeal is pending.

15 Based on the foregoing, plaintiff has failed to sufficiently state a claim against Valley for
 16 intentional interference with a prospective economic advantage. Accordingly, the court will grant
 17 Valley's motion to dismiss as to this claim.

18 **B. Sanctions**

19 Courts have three primary sources of authority upon which to sanction parties or their
 20 lawyers for improper conduct: "(1) Federal Rule of Civil Procedure 11, which applies to signed
 21 writings filed with the court, (2) 28 U.S.C. § 1927, which is aimed at penalizing conduct that
 22 unreasonably and vexatiously multiplies the proceedings, and (3) the court's inherent power."
 23 *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001).

24 **1. Rule 11**

25 Valley moves for sanctions under Rule 11, arguing that plaintiff's factual allegations lack
 26 evidentiary support and were brought for an improper purpose. (ECF No. 22). Valley argues that
 27 plaintiff's amended complaint sets forth allegations that plaintiff and her counsel knew were false
 28 at the time of filing. (ECF No. 22 at 5–6). Valley asserts that it provided plaintiff with records

1 from the VA that stated “[n]o information from Valley only dates of employment” and that plaintiff
 2 elected to proceed with a motion to amend the complaint despite the disclosure. (ECF No. 22 at
 3 10). Valley thus maintains that because it was apparent that it provided no misleading or negative
 4 information to the VA, plaintiff and her counsel pursued the instant matter for improper purposes,
 5 such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. (ECF No.
 6 22 at 7).

7 “Rule 11 is an extraordinary remedy, one to be exercised with extreme caution.” *In re*
 8 *Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 437 (9th Cir. 1996) (quoting *Operating Eng’s*
 9 *Pension Trust v. A-C Co.*, 859 F.2d 1336, 1345 (9th Cir. 1988)). The purpose of Rule 11 is to
 10 deter baseless filings and litigation abuses. *See Smith & Green Corp. v. Trs. of Constr. Indus. &*
 11 *Laborers Health & Welfare Tr.*, 244 F. Supp. 2d 1098, 1103 (D. Nev. 2003). Further, Rule 11
 12 addresses two separate problems: “first, the problem of frivolous filings; and second, the problem
 13 of misusing judicial procedures as a weapon for personal or economic harassment.” *Aetna Life*
 14 *Ins. Co. v. Alla Med. Servs., Inc.*, 855 F.2d 1470, 1475 (9th Cir. 1988).

15 “An attorney is subject to Rule 11 sanctions, among other reasons, when he presents to the
 16 court ‘claims, defenses, and other legal contentions . . . [not] warranted by existing law or by a
 17 nonfrivolous argument for the extension, modification, or reversal of existing law or the
 18 establishment of new law[.]’” *Holgate v. Baldwin*, 425 F.3d 671, 675–76 (9th Cir. 2005) (quoting
 19 Fed. R. Civ. P. 11(b)(2)). “A court considering a motion pursuant to Rule 11 must do two things:
 20 (1) decide whether a Rule 11 violation has occurred, and (2) decide whether to impose sanctions.”
 21 *Chambers v. Nasco, Inc.*, 501 U.S. 32, 35 (1991); *Avendano v. Sec. Consultants Grp.*, 302 F.R.D.
 22 588, 591 (D. Nev. 2014).

23 Where, as here, the complaint is the primary focus of Rule 11 proceedings, a district
 24 court must conduct a two-prong inquiry to determine (1) whether the complaint is
 25 legally or factually “baseless” from an objective perspective, and (2) if the attorney
 26 has conducted “a reasonable and competent inquiry” before signing and filing it.
 27 *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (quoting *Buster v. Greisen*,
 104 F.3d 1186, 1190 (9th Cir. 1997)).

28 In her response, plaintiff argues that sanctions are not proper because there is a
 proper basis for her claims and because the proposed second amended complaint is

1 sufficient to cure any alleged deficiencies. (ECF No. 29). Plaintiff asserts “the HR and
 2 Nursing management people at VA informed [her] that it was the negative information
 3 about her employment at VHS that caused VA to rescind the tentative job offer.” (ECF
 4 No. 29 at 5). Plaintiff further contends that she is not compelled to take as true the
 5 unauthenticated hearsay contained in the documents provided by Valley and that her claims
 6 are supported by circumstantial evidence so as to warrant an opportunity for further
 7 investigation and discovery. (ECF No. 29 at 7–8).

8 Upon consideration of the underlying pleadings, the court finds that plaintiff had enough
 9 information to file the complaint, but not enough evidence to sustain the complaint. Sanctions
 10 under Rule 11 is an “extraordinary remedy,” and the grounds set forth in Valley’s motion do not
 11 rise to the requisite level so as to warrant such a remedy.

12 Accordingly, the court will deny Valley’s motion for sanctions under Rule 11.

13 **2. Section 1927**

14 Plaintiff requests that the court grant her motion for sanctions under § 1927 and order
 15 defense counsel to personally satisfy her the costs, expenses, and attorney’s fees for responding to
 16 Valley’s motion to stay discovery and the instant motion for sanctions. (ECF No. 34 at 17).
 17 Plaintiff argues that defense counsel’s motion is in bad faith because the parties stipulated to a
 18 discovery plan and scheduling order in November (ECF Nos. 10, 11). (ECF No. 34 at 16). Plaintiff
 19 further contends that Valley’s motion to stay discovery was in bad faith because it was made to
 20 delay the instant matter and prevent plaintiff from taking third-party discovery. (ECF No. 34 at
 21 15).

22 The court may award attorney’s fees and costs pursuant to § 1927. Section 1927 provides
 23 as follows:

24 Any attorney or other person admitted to conduct cases in any court of the United
 25 States or any Territory thereof who so multiplies the proceedings in any case
 26 unreasonably and vexatiously may be required by the court to satisfy personally the
 excess costs, expenses, and attorneys’ fees reasonably incurred because of such
 conduct.

27 28 U.S.C. § 1927. Sanctions under § 1927 “must be supported by a finding of subjective bad
 28 faith.” *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d at 436 (quoting *New Alaska Dev. Corp. v.*

1 *Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989)). “Bad faith is present when an attorney
2 knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose
3 of harassing an opponent.” *Id.* (citation omitted).

4 Here, plaintiff has failed to show, or even allege, that defense counsel “multiplied”
5 proceedings in the instant case or that defense counsel acted recklessly or in bad faith. “An
6 attorney’s delays and failures to act warrant § 1927 sanctions only if they are so egregious as to
7 ‘multiply’ the proceedings.” *Schmitzer v. Cty. of Riverside*, 26 F. App’x 701, 703 n.6 (9th Cir.
8 2002) (citing *W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1528 (9th Cir. 1990)
9 (affirming § 1927 sanctions where counsel failed to provide any evidence of discriminatory intent,
10 failed to answer interrogatories, failed to respond to a document demand and failed to drop the
11 case after improperly serving a defendant)).

12 Accordingly, plaintiff’s motion for sanctions under § 1927 will be denied.

13 **IV. Conclusion**

14 Accordingly,


15 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Valley’s motion to
16 dismiss (ECF No. 16) be, and the same hereby is, GRANTED without prejudice consistent with
17 the foregoing.

18 IT IS FURTHER ORDERED that Valley’s motion to stay (ECF No. 30) be, and the same
19 hereby is, DENIED as moot.

20 IT IS FURTHER ORDERED that Valley’s motion for sanctions pursuant to Rule 11 (ECF
21 No. 22) be, and the same hereby is, DENIED.

22 IT IS FURTHER ORDERED that plaintiff’s motion for sanctions pursuant to 28 U.S.C. §
23 1927 (ECF No. 34) be, and the same hereby is, DENIED.

24 DATED March 9, 2017.

25 
26 UNITED STATES DISTRICT JUDGE
27
28